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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Gary Null & Associates, Inc., Plaintiff, - against – Wikimedia Foundation, Inc. (solely as a nominal defendant) and John or Jane Does 1-10, Defendants.	Case No. 09-112745

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT WIKIMEDIA FOUNDATION, INC.'S MOTION TO DISMISS AND FOR SANCTIONS AND ATTORNEY FEES

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Defendant Wikimedia Foundation, Inc. ("Wikimedia"), though its undersigned counsel, respectfully submits this memorandum of law in support of its motion (1) pursuant to C.P.L.R. 3211(a)(7), to dismiss the Amended Complaint filed against it by Gary Null and Gary Null & Associates, Inc. ("GNA"),[1] and (2) pursuant to 22 N.Y.C.C.R. Section 130-1.1 and C.P.L.R. 8303-a, for an order imposing sanctions and/or directing GNA to pay Wikimedia's reasonably incurred expenses and attorney fees for pursuing this frivolous action and asserting baseless factual allegations.

PRELIMINARY STATEMENT

GNA and its President Gary Null assert a $100 million defamation claim against Wikimedia, operator of a well-known not-for-profit Internet encyclopedia, in a transparent attempt to stifle free speech on the Internet and force Wikimedia to remove from the Wikipedia.org website references to the existence of critical commentary about GNA and Null. The claims against Wikimedia arise out of allegations that anonymous third-parties edited the Wikipedia.org webpage for Gary Null and in the "Criticisms" section, described the existence of criticism of Null authored by third parties, and posted Internet links to third-party websites that allegedly defame Null and GNA. Although Plaintiffs admit that the content at issue was provided by anonymous third-parties, Plaintiffs seek to hold Wikimedia liable for defamation as a "publisher" or "co-author" of this content.

Under an overwhelming body of authority, the claims against Wikimedia plainly are barred by Section 230 of the Communications Decency Act, 47 U.S.C. § 230(c) ("CDA"). Specifically, Section 230(c)(1) bars any cause of action that treats an interactive computer service such as Wikimedia as the "publisher or speaker" of any content provided by a third party, and Section 230(c)(2) bars suits seeking to hold services such as Wikimedia liable for their exercise of a publisher's traditional editorial functions, such as deciding whether to publish,

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[1] Although the caption of this action lists Gary Null & Associates, Inc. as the only plaintiff, the Amended Complaint purports to be brought on behalf of both GNA and Gary Null.

withdraw, or alter content. An unbroken line of dozens of cases have held that Section 230(c) immunity applies in circumstances indistinguishable from those presented by this case.

Upon learning of GNA's filing of its original complaint against Wikimedia, counsel for Wikimedia promptly notified GNA that GNA's claims were barred in their entirety by the CDA and sent GNA citations to dozens of opinions dismissing similar claims, but GNA declined to dismiss its claims against Wikimedia. Instead, it served an amended complaint that added Gary Null as a plaintiff and adds a sprinkling of new factual allegations that in no way take the claims against Wikimedia outside of the broad scope of CDA immunity. Moreover, GNA and Null added a factual allegation—that a Mr. John Reaves was "employed by WIKIPEDIA"— that is untrue and for which Plaintiffs have no good faith basis to allege. Although counsel for Wikimedia again notified Plaintiffs' counsel that the amended claims against Wikimedia were still barred by Section 230(c), and advised him that Mr. Reaves was not and had never been an employee of Wikipedia, Plaintiffs declined to dismiss the claims against Wikimedia and forced it to defend against frivolous claims and allegations.

Because Wikimedia is immune from suit pursuant to Section 230(c) for the conduct alleged in the Amended Complaint, the claims against Wikimedia must be dismissed with prejudice. As Plaintiffs have asserted and continue to assert frivolous claims after being specifically advised that the claims are baseless, Wikimedia is entitled to costs and reasonable attorney's fees pursuant to C.P.L.R. 8303-a. Additionally, because Plaintiffs and their counsel have engaged in frivolous conduct by asserting claims that are completely without merit in law, asserted a material factual statement that is false, and continue to assert such claims and factual statements after the lack of legal and factual basis were brought to their attention, Wikimedia respectfully requests that the Court exercise its discretion to sanction Plaintiffs and their counsel.

BACKGROUND

A. Wikimedia Foundation

Wikimedia Foundation is the parent organization of a number of online resources, including the popular Internet encyclopedia, Wikipedia (http://en.wikipedia.org). *See* Amend.

Compl. ¶¶ 1, 7. The articles on Wikipedia, which number well into the millions, are created and edited by Internet users. *Id.* ¶ 2. These Internet users may be registered editors, or may choose to remain anonymous. *See id.* ¶¶ 1, 2. Wikipedia maintains editing guidelines requiring Internet users to post only credibly-sourced information that is verifiable and of a neutral viewpoint. *Id.* ¶ 18. Wikipedia articles contain references to source material including Internet links to articles posted on third-party websites. *See id.* ¶ 7.

B. The Amended Complaint

The Amended Complaint alleges that certain anonymous Internet editors (*i.e.* Internet users who post and edit content on Wikipedia) have perpetrated an "ongoing campaign" against GNA and Gary Null, designed to discredit Null's academic credentials, qualifications, and research in the field of alternative medicine. *Id.* ¶ 1. This campaign has allegedly included posting information to the Wikipedia article dedicated to Null (http://en.wikipedia.org/wiki/GaryNull) (hereinafter the "Null Wikipedia Page") that includes Internet links to third-party websites allegedly containing "incorrect, misleading and disparaging information." *Id.* ¶¶ 2, 6. Under the heading, "Criticisms," the Null Wikipedia Page stated:

> Many of Null's viewpoints are controversial and he has attracted the attention of Stephen Barrett of Quackwatch. Barrett criticizes the validity of Null's PhD thesis, his alternative health claims, and several of his commercial products.[2]
>
> The James Randi Educational Foundation, an organization that aims to promote critical thinking, has accused him, together with Wayne Dyer, of "dealing in nonsense", promoting the notion of eternal youth, and prescribing magnets and "other medieval tools" to prevent aging.[3]
>
> In 2009, Null was criticized for his remarks as a keynote speaker at a political rally against mandatory vaccination against H1N1 influence at the New York

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[2] *Citing* "Stephen Barrett, MD. 'A Critical Look at Gary Null's Activities and Credentials.' Quackwatch. http://www.quackwatch.org/04ConsumerEducation/null.html. Retrieved 2007-02-11."

[3] *Citing* "Randi, James. 'Science & Pseudoscience: the Differences", *Swift: Newsletter of James Randi Educational Foundation*, JREF, March 19, 2004."

> State Capitol in Albany, New York.[4] New York State Health Commissioner Richard Daines said, "Like any number of things he's wrong about, he's wrong about that." [5]

Id. Ex. A.

The Stephen Barrett and James Randi articles referenced in the Null Wikipedia Page and for which Internet links were provided by the anonymous editors allegedly contain defamatory statements concerning Gary Null. *See id.* ¶¶ 7, 8. Plaintiffs appear to be asserting a defamation claim against Wikimedia based on third party editors' describing the existence of the criticism of Gary Null, and posing links to the allegedly defamatory articles. Additionally, the Amended Complaint alleges that Null advised Wikipedia of the existence of libelous material on the Null Wikipedia Page and that "Mr. John Reaves, an employee currently employed by WIKIPEDIA" removed a portion of the content at issue, but allowed other content to remain on the Page, including the Internet link to one of the third-party websites containing allegedly defamatory content. *Id.* ¶¶ 9, 18.[6] "John Reaves" is alleged to have responded by suggesting that "if you are challenging the information presented on an external site, I suggest you take issue with that site." *Id.* ¶ 9.

Rather than taking Mr. Reaves's advice, GNA and Null filed their Amended Complaint seeking $100,000,000 against Wikimedia and ten John or Jane Doe Internet users who allegedly posted the descriptions of criticisms and links to the third-party websites. *Id.* ¶ 25. In addition to claiming that Wikimedia is liable as a "publisher" for alleged defamatory statements posted by others on the Wikipedia website, the Amended Complaint also asserts that by exercising editorial

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[4] *Citing* "Charles Scirbona, 'Health workers angry over mandatory swine flu shots: DOH commissioner says vaccinations are safe,' *Legislative Gazette*, October 6, 2009, found at Legislative Gazette website. Accessed October 6, 2009."

[5] *Id.*

[6] As explained in connection with Wikimedia's motion for costs and attorney fees and/or sanctions, John Reaves is not, and has never been an "employee" of Wikipedia, however for purposes of Wikimedia's motion to dismiss only, Wikimedia assumes the allegation to be true as (continued...)

control over the postings on the Wikipedia website, Wikimedia is liable for the third-party statements as a "Facilitator and/or Co-Author" of the allegedly defamatory content. *Id.* ¶¶ 9, 13.

The Amended Complaint asserts two causes of action against Wikimedia: (1) defamation and (2) injunctive relief seeking the permanent removal of the allegedly defamatory information and links contained in the Null Wikipedia Page. *Id.*

C. Wikimedia's Notice To Plaintiffs' Counsel of Frivolous Claims and Conduct

GNA filed its original complaint on September 8, 2009 alleging that Wikimedia was liable for allegedly defamatory content posted in the Null Wikipedia Page simply because the content was posted on Wikipedia, irrespective of Wikimedia's role in the creation of the content. *See* Certification of Tonia Ouellette Klausner ("Klausner Cert.") ¶ 3 & Ex. A. In a telephone conversation and by email dated September 10, 2009, Wikimedia's counsel Tonia Ouellette Klausner informed GNA's counsel Leslie Fourton that GNA's claims against Wikimedia were clearly barred by the CDA. *Id.* ¶¶ 4, 5 & Ex. B. Klausner further demanded that GNA dismiss its claims against Wikimedia, and advised that Wikimedia would seek sanctions if required to defend the action. *Id.* ¶ 4 & Ex. B. In response, Fourton advised Klausner that GNA had decided not to serve its complaint on Wikimedia. *Id.* ¶ 5. A month later Fourton called Klausner and advised that GNA and Null had changed their mind and would be filing an amended complaint that they believed would not be barred by the CDA. *Id.* ¶ 6. Upon service of the Amended Complaint, Klausner informed Fourton by letter dated October 26, 2009 that the new allegations in the Amended Complaint did not take the claims against Wikimedia out of the broad scope of CDA immunity. *Id.* ¶ 7 & Ex. C. Klausner further informed Fourton that John Reaves was not an employee of Wikimedia as alleged in the Amended Complaint. *Id.* Klausner put Plaintiffs on notice that if they did not agree to dismiss Wikimedia from the action, Wikimedia would file a motion to dismiss and seek sanctions, including but not limited to

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required in connection with a motion under C.P.L.R. 3211(a)(7). *See, e.g., AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 N.Y. 3d 582, 591 (N.Y. 2005).

reimbursement of all costs and attorneys fees incurred by Wikimedia in responding to GNA and Null's frivolous claims. *Id.* Despite this clear notice, Plaintiffs declined to dismiss Wikimedia from the action.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE BARRED AS A MATTER OF LAW BY SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

A. Congress Determined That Traditional Standards of Publisher and Distributor Liability Should Not Apply In The Context of The Internet

Congress long ago recognized that in order to realize the Internet's full promise as a communication medium, Internet companies like Wikimedia that allow access to content provided by third parties could not be subjected to liability simply because such content was accessible through their services. Congress also recognized that traditional publisher and distributor liability standards created a disincentive for Internet companies to exercise any editorial control over content provided by others. Accordingly, in 1996, Congress enacted Section 230 of the Communications Decency Act of 1996. *See Batzel v. Smith,* 333 F.3d 1018, 1026 (9th Cir. 2003) (recognizing that the CDA "overrides the traditional treatment of publishers, distributors, and speakers under statutory and common law. As a matter of policy, 'Congress decided not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations, all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others.'") (quoting *Blumenthal v. Drudge,* 992 F. Supp. 44, 49 (D.D.C. 1998)).

The immunity granted by Congress to Internet services such as Wikimedia from defamation and other claims based on providing access to or exercising editorial control over content provided by third parties is reflected in three sub-sections of the CDA:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

47 U.S.C. § 230(c)(1).

> No provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material . . . .

Id. § 230(c)(2).

> No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

Id. § 230(e)(3).[7]

As court after court has explained in interpreting the CDA, Congress was concerned about the chilling effect on accessibility to the free flow of information on the Internet if interactive service providers were held liable for content created by others. *See, e.g., Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) ("The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum"). Thus, for policy reasons, Congress decided that ***only*** those who originally authored allegedly harmful content may be held liable for any harm caused by the availability of such content on the Internet. As explained by the Fourth Circuit: "Congress made a policy choice . . . not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages." *Id.* at 330-31; *see also Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998) (explaining that Congress "made the legislative judgment to effectively immunize providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others"); *Batzel*, 333 F.3d at 1020 ("Congress . . . has chosen for policy reasons to immunize from liability for defamatory or obscene speech 'providers and users of

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[7] Section 230(c) recognizes only a handful of exceptions to its wide-ranging immunity. Prosecutorial enforcement of criminal laws is outside the ambit of Section 230(c), as are civil claims for violation of federal trademark, copyright and patent rights, and claims for alleged violation of federal wiretapping laws. *See* 47 U.S.C. § 230(e)(1), (2), (4). None of these exceptions are applicable here.

interactive computer services' when the defamatory or obscene material is 'provided' by someone else.").

B. The CDA Immunizes Internet Companies Such As Wikimedia From Claims Arising Out Of Content Originating With A Third Party

Despite being a relatively recent statute, Section 230(c) already has a rich judicial history, and time and time again it has been interpreted broadly, in favor of Internet companies and against vexatious litigants who seek to hold those companies liable for the content of others. At this point it is beyond serious dispute that website operators such as Wikimedia cannot be held liable for content originating with a third party. *See, e.g., Doe v. Myspace, Inc.,* 528 F.3d 413, 419 (5th Cir. 2008), *cert. denied* 129 S. Ct. 600 (2008) ("Parties complaining that they were harmed by a Web site's publication of user-generated content have recourse; they may sue the third-party user who generated the content, but not the interactive computer service that enabled them to publish the content online."); *Green v. America Online*, 318 F.3d 465, 470-72 (3d Cir. 2003) (affirming dismissal of claims against Internet service provider arising out of defamatory statements prepared by others); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123-25 (9th Cir. 2003) (recognizing that the Ninth Circuit had "joined the consensus developing across other courts of appeals that § 230(c) provides broad immunity for publishing content provided primarily by third parties"); *Ben Ezra, Weinstein, & Co. v. America Online, Inc.*, 206 F.3d 980, 984-85 (10th Cir. 2000) (Section 230 "creates a federal immunity to any state law cause of action that would hold computer service providers liable for information originating with a third-party"); *Zeran v. America Online, Inc.,* 129 F.3d 327, 330 (4th Cir. 1997) ("By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third party user of the service"); *Finkel v. Facebook, Inc.*, No. 102578/09, 2009 WL 3240365 (N.Y. Sup. Ct. Sept. 15, 2009) (dismissing claims against Facebook and holding that the CDA "is triggered if the content was provided by another party"); *Intellect Art Multimedia, Inc. v. Milewski*, No. 117024/08, 2009 WL 2915273, at *7 (N.Y. Sup. Ct. Sept. 11, 2009) (dismissing all claims against an interactive service provider

pursuant to the CDA "premised upon statements made by [the individual defendant] and/or other users of [the website wherein allegedly defamatory content was posted]"); *Chelsea Fine Custom Kitchens, Inc. v. Apartment Therapy LLC*, No. 0603554/2007, 2008 WL 2693129, at *1 (N.Y. Sup. Ct. June 27, 2008) (dismissing claims against website based on comments posted to the website by third parties). [8]

It is equally clear that Section 230 immunity applies regardless of whether the website operator was on notice of the allegedly harmful content. *See, e.g., Green,* 318 F.3d at 470-71; *Zeran,* 129 F.3d at 330-34; *Parker,* 422 F. Supp. 2d at 500; *Barrett,* 146 P.3d at 513 (rejecting argument that service providers can be liable consistent with CDA if they republish statement with notice of its defamatory character; "Until Congress chooses to revise the settled law in this area . . . plaintiffs who contend they were defamed in an Internet posting may only seek recovery from the original source of the statement."); *Donato v. Moldow,* 865 A.2d 711, 726 (N.J. App. Div. 2005) ("Notice from the offended party that the material is false or otherwise improper does not defeat the immunity."). [9]

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[8] *See also Parker v. Google, Inc.,* 422 F. Supp. 2d 492, 500-01 (E.D. Pa. 2006) (dismissing claims against Internet search service arising out of search results and archives, which reflect content prepared by third parties); *DiMeo v. Max,* 433 F. Supp. 2d 523, 529-31 (E.D. Pa. 2006) (dismissing claim against web site owner arising out of posts written by third parties); *Novak v. Overture Servs., Inc.,* 309 F. Supp. 2d 446, 452-53 (E.D.N.Y. 2004) (dismissing claim against Internet service provider arising out of material posted by third party on service provider's online discussion groups); *MCW, Inc. v. Badbusinessbureau.com, L.L.C.*, No. Civ. A.3:02-CV-2727-G, 2004 WL 833595 (N.D. Tex. Apr. 19, 2004); *Smith v. Intercosmos Media Group, Inc.,* No. Civ. A. 02-1964, 2002 WL 31844907, at *1 (E.D. La. Dec. 17, 2002); *PatentWizard, Inc. v. Kinko's Inc.*, 163 F. Supp. 2d 1069, 1071 (D.S.D. 2001); *Blumenthal*, 992 F. Supp. at 52; *Barrett v. Rosenthal,* 146 P.3d 510, 529 (Cal. 2006); *Doe v. America Online, Inc.*, 783 So. 2d 1010, 1017 (Fla. 2001); *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703 (Cal. Ct. App. 2002); *Schneider v. Amazon.com, Inc.,* 31 P.3d 37, 42 (Wash. Ct. App. 2001); *Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684, 692-98 (Cal. Ct. App. 2001); *Barrett v. Fonorow*, 799 N.E. 2d 916, 924-25 (Ill. App. Ct. 2003); *Jane Doe One v. Oliver,* 755 A.2d 1000, 1003-04 (Conn. Super. Ct. 2000), *aff'd*, 792 A.2d 911 (Conn. App. Ct. 2002).

[9] Congress has supported the courts' broad application of immunity under the CDA. In enacting the Dot Kids Implementation and Efficiency Act of 2002, 47 U.S.C. § 941, Congress explicitly considered the judiciary's reading of Section 230 immunity and agreed with the numerous courts that had broadly interpreted it, stating: "[t]he courts have correctly interpreted section 230(c)". *See* H.R. Rep. No. 107-449, at 13 (2002).

Courts also have uniformly held that the CDA immunizes service providers from suit even if the service provider edits, facilitates or re-posts content created by, or originating with, third parties. *See, e.g., Green*, 318 F.3d at 470-71 ("Under § 230(c) . . . so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process."); *Carafano*, 339 F.3d at 1124 (same); *Doe v. Friendfinder Network, Inc.*, Civil No. 07-cv-286(JL), 2008 WL 2001745, at *1 (D.N.H. May 8, 2008) (holding that CDA "leaves no room for liability on the theory that a service provider 're-posted' – by the actions of either man or machine – actionable information, so long as that information was provided by someone else."); *Murawski v. Pataki*, 514 F. Supp. 2d. 577, 591 (S.D.N.Y. 2007) ("Deciding whether or not to remove content or deciding when to remove content falls squarely within [interactive service provider's] exercise of a publisher's traditional role and is therefore subject to the CDA's broad immunity.").

Claims for equitable relief also are barred by the CDA. *See, e.g., Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 540 (E.D. Va. 2003), *aff'd*, 2004 WL 602711 (4th Cir. 2004), ("[G]iven that the purpose of § 230 is to shield service providers from legal responsibility for the statements of third parties, § 230 should not be read to permit claims that request only injunctive relief."); *Intercosmos Media Group, Inc.*, 2002 WL 31844907, at *5 ("[A]ny claim made by the plaintiffs for damages or injunctive relief with regard to either defamation and libel, or negligence and fault [], are precluded by the immunity afforded by Section 230(c)(1), and subject to dismissal"); *Ben Ezra, Weinstein & Co. v. America Online, Inc.*, No. 97-485 LH/LFG, 1999 WL 727402, at *3 (D.N.M. Mar. 1, 1999) ("[T]he Plaintiff seeks injunctive relief from the Defendants continued publication of inaccurate stock information. AOL is again entitled to Section 230 immunity and this claim will be dismissed as well."), *aff'd*, 206 F.3d 980, 983-86 (10th Cir. 2000), *cert. denied*, 531 U.S. 824 (2000); *Kathleen R.*, 87 Cal. App. 4th at 698 ("[A]ctions and claims for declaratory and injunctive relief are no less causes of action than tort claims for damages and thus fall squarely within the section 230(e)(3) prohibition.").

Resolution of whether Section 230(c) applies is appropriate on a motion to dismiss. *See, e.g., Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 427 (1st Cir. 2007); *DiMeo v. Max*, No. 06-3171, 2007 WL 2717865, at *3 (3d Cir. Sept. 19, 2007); *Green*, 318 F.3d at 473; *Murawski*, 514 F. Supp. 2d at 591; *Novak*, 309 F. Supp. 2d at 458; *Finkel*, 2009 WL 3240365; *Intellect Art Multimedia, Inc.*, 2009 WL 2915273; *Chelsea Fine Custom Kitchens,* 2008 WL 2693129.

C. CDA Immunity Bars Plaintiffs' Claims

Plaintiffs' claims against Wikimedia are barred by Section 230 because: (1) Wikimedia is a provider of "interactive computer service[s]," (2) the claims seek to treat Wikimedia as a "publisher or speaker" and (3) the allegedly harmful content at issue was created or developed by "another information content provider."[10] *See* 47 U.S.C. § 230(c)(1).

First, there can be no dispute that Wikimedia is a provider of an "interactive computer service." The CDA defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server . . . ." 47 U.S.C. § 230(f)(2). Wikimedia's website at issue here, Wikipedia, allows millions of Internet users to access, create, view, edit and share online encyclopedia articles for educational, research or entertainment purposes. Courts routinely have held that website operators providing the means for Internet users to share content, including services hosting links to third-party websites, are interactive computer services for purposes of the CDA. *See, e.g., Murawski,* 514 F. Supp. 2d at 591 ("Ask.com is an 'interactive computer service' because it is an internet search engine that allows members of the public to search its directory of web pages"); *Parker,* 422 F. Supp. at 500-01 ("there is no doubt that Google qualifies as an 'interactive computer service'"); *Novak,* 309 F. Supp. 2d at 452 (host of Internet discussion group); *Donato,* 865 A.2d at 487-88 (operator of electronic community bulletin board); *Faegre*

[10] By moving to dismiss Plaintiffs' claims pursuant to the immunity provided to Wikimedia by the CDA, Wikimedia in no way waives any other defense and expressly reserves the right to move against the Amended Complaint on other grounds.

& Benson, LLP v. Purdy, 367 F. Supp. 2d 1238, 1249 (D. Minn. 2005) (stating that defendants "who run web sites on which Internet users can post comments are providers of interactive computer services" under the CDA); *DiMeo*, 433 F. Supp. 2d at 529 (holding that website that hosts message boards qualifies as an interactive computer service provider); *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 538 (E.D. Va. 2003) ("the parties agree, as they must, that AOL is an 'interactive computer service provider' as defined by § 230").

Second, it is clear from the Amended Complaint that Plaintiffs' claims seeks to treat Wikimedia as a "publisher or speaker" of the allegedly defamatory content posted by third parties. *See, e.g.,* Amend. Compl. ¶¶ 2, 6, 9, 11, 13, 19. Numerous courts have found that claims based on the posting of allegedly defamatory information and the service provider's failure to remove the information even after notice seek to treat the provider as a publisher or speaker for purposes of Section 230(c)(1) immunity. *See, e.g., Green,* 318 F.3d at 470 (claims based upon AOL's alleged failure to police its chat rooms for defamatory statements even after given notice of such harmful content sought to treat AOL as the publisher or speaker of the content); *Zeran,* 129 F.3d at 333; *Donato*, 865 A.2d at 726.

Third, it is apparent from the Amended Complaint that the allegedly defamatory statements at issue originated with someone other than Wikimedia, namely: (1) the anonymous editor(s) who created the textual content in the "Criticisms" section of the Null Wikipedia Page, see Amend. Compl. ¶ 6; (2) Stephen Barrett, MD and his Quackwatch website, *see id.* ¶¶ 7, 14, 16, 17, 18, 19; and, (3) James Randi and the James Randi Educational Foundation, *see id.* ¶¶ 8, 18, 21. There is no allegation that Wikimedia itself was the original creator of the content at issue. Indeed, there could be no such allegation made in good faith, when Wikimedia, by its very nature, merely facilitates access to articles jointly created by others.

To the extent that the Amended Complaint seeks to avoid CDA immunity based on the theory that Wikimedia became a "co-author" of the content by editing some of it while leaving part of it intact, *see id.* ¶ 13, the claims against Wikimedia remain frivolous. Courts routinely have rejected the argument that a website operator becomes a publisher, and is thereby stripped

of CDA immunity, by exercising its editorial prerogative to edit, delete, select or alter content posted by third parties. For example, in *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, No. 07-956-PHX-FJM, 2007 WL 2949002, at *3 (D. Ariz. Oct. 10, 2007), the plaintiff argued that the defendant website "adopted" a third party's statements by failing to remove them after receiving a request to do so, "and that this 'adoption' is tantamount to creation or development." The court dismissed the complaint and held that "[d]efendant's failure to remove the [allegedly defamatory content] was an 'exercise of a publisher's traditional editorial functions' and does not defeat CDA immunity." *Id.* (*quoting Zeran*, 129 F.3d at 330); *see also Batzel*, 333 F.3d at 1031 (rejecting plaintiff's argument that a listserv manager lost CDA immunity because he selected and edited content created by a third party before distributing it); *Ben Ezra*, 206 F.3d at 985-86 (refusing to accept plaintiff's argument that "alteration of information constitutes 'creation or development' of information and transforms [the interactive service provider] into" an author of the content); *Donato*, 865 A.2d at 726 (operator's selective editing, deletion and re-writing of anonymously posted content did not transform the operator into a content provider).

Because the claims against Wikimedia fall squarely within the protections of Section 230(c) immunity as a matter of law, this Court should dismiss such claims with prejudice pursuant to C.P.L.R. 3211(a)(7).

II. THE COURT SHOULD AWARD WIKIMEDIA COSTS IT INCURRED IN DEFENDING AGAGINST THIS PATENTLY FRIVOLOUS COMPLAINT, AND IMPOSE SANCTIONS ON PLAINTIFFS AND THEIR COUNSEL FOR THEIR FRIVOLOUS CONDUCT

Section 8303-a of the C.P.L.R. calls for the award of costs and attorney's fees of up ten thousand dollars against a party, his attorney, or both, in certain types of actions where a claim "was commenced or continued in bad faith without any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification or reversal of existing law." C.P.L.R. 8303-a(c)(ii). This Section applies to defamation claims, and has been interpreted to mandate the assessment of costs and attorneys following a finding of frivolousness.

See, e.g., Nyitray v. New York Athletic Club, 274 A.D. 2d 326, 327 (1st Dep't 2000); *Mitchell v. Herald Co.*, 137 A.D. 2d 213, 214 (4th Dep't 1988).

The Court also has discretion to award costs, including attorney's fees and/or impose financial sanctions upon any party or attorney under the Rules of the Chief Administrator of the Courts for engaging in frivolous conduct in pursuit of any civil action. *See* 22 N.Y.C.R.R. § 130-1.1(a), (b). Conduct is "frivolous" under this provision if:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.

Id. § 130.11(c). In considering whether conduct meets this definition of frivolous, courts place great weight on whether the conduct was continued after the lack of legal or factual basis was identified. *See, e.g., Navin v. Mosquera,* 30 A.D. 3d 883, 884 (3d Dep't 2006).

Here, Plaintiffs' claims against Wikimedia are patently frivolous. As set forth in Section I above, the claims are barred by Section 230(c) of the CDA as interpreted by a tremendous number of courts, including this one. In discussions with Plaintiffs' counsel, he neither identified any case law, nor articulated any reasonable basis for arguing for a change or reversal of existing law, that would allow Plaintiffs to pursue this action against Wikimedia as an alleged "co-author" or "facilitator". *See* Klausner Cert. ¶¶ 4, 6. Moreover, even after Wikimedia's counsel notified Plaintiffs' counsel of the lack of merit to the claims and the falsity of the factual allegation that John Reaves is employed by Wikipedia, which he is not (*see* Affidavit of Michael Godwin, dated November 9, 2009), Plaintiffs and their counsel deliberately chose to stand by their claims and allegations. Klausner Cert. ¶¶ 6, 7 & Ex. C. Accordingly, an award of costs and attorney's fees of up ten thousand dollars is mandated by C.P.L.R. 8303-a, and the court should exercise its discretion under 22 N.Y.C.R.R. § 130-1.1 and impose additional financial sanctions upon Plaintiffs and their counsel for their frivolous conduct. *See, e.g., Grasso v. Mathew,* 164

A.D. 2d 476 479-80 (3d Dep't 1991) (imposing sanctions where party pursued libel claim despite knowledge that claim was frivolous); *Mitchell,* 137 A.D.2d at 218-20 (award of costs and attorney fees mandatory where plaintiff pursued frivolous defamation claim). Only by imposing costs and attorney fees and/or sanctions can this Court deter similar claims against website operators in the future.

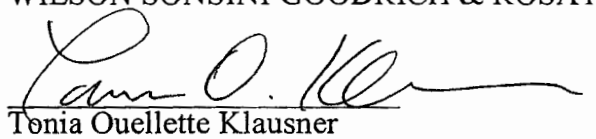
CONCLUSION

For the foregoing reasons, Defendant Wikimedia respectfully requests that the Court dismiss the claims against Wikimedia with prejudice, award Wikimedia court costs and attorneys fees, impose sanctions against Plaintiffs and their counsel, and award such other and further relief as the Court deems just and proper.

Dated: November 10, 2009

Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI, P.C.

By: 

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